

# Hate Crime *and* Civil Rights in Wisconsin



A Report of the  
Wisconsin Advisory Committee to the  
U.S. Commission on Civil Rights

**MONTH 2017**

## **Advisory Committees to the U.S. Commission on Civil Rights**

By law, the U.S. Commission on Civil Rights has established an advisory committee in each of the 50 states and the District of Columbia. The committees are composed of state citizens who serve without compensation. The committees advise the Commission of civil rights issues in their states that are within the Commission's jurisdiction. More specifically, they are authorized to advise the Commission in writing of any knowledge or information they have of any alleged deprivation of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, national origin, or in the administration of justice; advise the Commission on matters of their state's concern in the preparation of Commission reports to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their state or district.

## **Acknowledgements**

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## II. INTRODUCTION

The U.S. Commission on Civil Rights (Commission) is an independent, bipartisan agency established by Congress and directed to study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, national origin, or in the administration of justice. The Commission has established advisory committees in each of the 50 states and the District of Columbia. These Advisory Committees advise the Commission of civil rights issues in their states that are within the Commission's jurisdiction.

On September 12, 2013 the Wisconsin Advisory Committee (Committee) to the U.S. Commission on Civil Rights hosted a series of five panel discussions as part of a public meeting in Madison, Wisconsin. The Committee's purpose was to better understand the incidence and impact of hate crimes in the State from a civil rights perspective. This meeting was prompted in part by a tragic event on August 5th, 2012, when a man by the name of Wade Michael Page entered a Sikh Temple in the city of Oak Creek, Wisconsin and indiscriminately opened fire, fatally wounding six members of the Temple before being injured by law enforcement and then taking his own life at the scene. Though he did not leave explicit evidence as to his motive for these killings, his long standing affiliation with hate groups suggested that the shooting was motivated by religious bias.<sup>1</sup> The act was labeled as one of "domestic terrorism," and it prompted a September 19, 2012 hearing on Hate Crimes and the Threat of Domestic Extremism before the Senate Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights and Human Rights.<sup>2</sup> It also spurred a national conversation on the rise and impact of hate crimes, hate groups, and the country's legislative response.

Hate crime by definition is criminal behavior targeted at an individual because of his or her real or perceived association with personal characteristics that are protected under civil rights law. The United States Federal Bureau of Investigation (FBI) defines a hate crime as a "criminal offense against a person or property motivated in whole or in part by an offender's bias against a

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<sup>1</sup> New York Times *Gunman Kills 6 at Sikh Temple near Milwaukee* Published August 5, 2012. At: <http://www.nytimes.com/2012/08/06/us/shooting-reported-at-temple-in-wisconsin.html?pagewanted=all> (last accessed Dec. 24, 2014). See also; Elías, Marilyn. *Sikh Temple Killer Wade Michael Page Radicalized in Army*, Southern Poverty Law Center Intelligence Report, Winter 2012 Issue 148 at: <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2012/winter/massacre-in-wisconsin> (last accessed Dec. 4, 2014) And: Iyer, Deepa, *Oak Creek Community Marks Two Years Since Sikh Temple Shooting* Published August 5, 2014 Available at: <http://www.nbcnews.com/news/asian-america/oak-creek-community-marks-two-years-sikh-temple-shooting-n171981> (last accessed Dec. 4, 2014)

<sup>2</sup> Testimony available at: [http://www.judiciary.senate.gov/meetings/time-change\\_hate-crimes-and-the-threat-of-domestic-extremism](http://www.judiciary.senate.gov/meetings/time-change_hate-crimes-and-the-threat-of-domestic-extremism) (last accessed Dec. 24, 2014)

race, religion, disability, ethnic origin, or sexual orientation.”<sup>3</sup> The panels before the Wisconsin Advisory Committee on September 12, 2013 included testimony from community members, advocates, legal professionals, scholars, government officials, and law enforcement. The panelists’ testimony focused on current hate crime activity in the State of Wisconsin, the effectiveness of applicable laws, and recommendations to address outstanding equal protection concerns. The agenda also included an open forum for discussion whereby members of the public could comment.

Following this meeting, the Committee began a discussion of findings and recommendations to issue to the Commission resulting from the testimony heard. However, the Committee member appointment terms expired before such a report was released. A number of administrative challenges created further delay in finalizing Committee appointments to the subsequent term. On April 27, 2016, the presently appointed Committee voted unanimously to revisit the outstanding, 2013 study on hate crime in Wisconsin. As part of this work, on August 29, 2016, the Committee held an additional public hearing in Milwaukee, Wisconsin. The purpose of this hearing was to solicit current testimony from both academic experts and a diverse group of community leaders to regarding any changes to the status and incidence of hate crime in Wisconsin since the time of the original, 2013 testimony. In addition, the Committee reached out to all 2013 panelists to offer them the opportunity to provide any revisions or updated information related to their original testimony.

The report that follows provides an analysis of the testimony before the Committee during both the 2013 and 2016 public meetings of the Committee in the context of current hate crimes legislation and incidence in Wisconsin. It begins with an overview of federal hate crimes law and applicable statutes in the State of Wisconsin, as well as current statistics regarding the incidence of hate crimes. It then provides an overview of panelist testimony, including an overview of the community’s experience with hate crime in Wisconsin, a discussion of the merits and challenges of hate crime penalty enhancement, and the challenges facing law enforcement in successfully identifying and prosecuting hate crime. The report concludes with a discussion of potential solutions and a series of recommendations for addressing identified challenges. The purposes of this report are: (1) to relay the civil rights concerns brought forth by the panels in the context of current hate crimes incidence and applicable hate crimes law; and (2) to lay out specific recommendations to the Commission regarding actions that can be taken to better understand and address these issues moving forward.

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<sup>3</sup> Federal Bureau of Investigations, Civil Rights, Hate Crimes Overview. Available at: [http://www.fbi.gov/about-us/investigate/civilrights/hate\\_crimes/overview](http://www.fbi.gov/about-us/investigate/civilrights/hate_crimes/overview) (last accessed Dec. 16, 2014)

### III. BACKGROUND

#### A. Federal Hate Crimes Statutes

The Civil Rights Act of 1968 (CRA) was a momentous statute that criminalized a new class of hate motivated acts.<sup>4</sup> The CRA sought to address racial violence against civil rights workers and individuals pursuing federally protected activities. The CRA permits federal prosecution of any person who willfully injures, intimidates, or interferes with another person, or attempts to do so, by force because of the victim's race, color, religion, or national origin, provided that the offense occurred while the victim was attempting to engage in a statutorily protected activity.<sup>5</sup> Examples of statutorily protected activities under the CRA include voting, enrolling in or attending any institution of public education, applying for or enjoying employment by any private or public employer, and enjoying the benefits or services of any establishment of public accommodation such as hotels, restaurants, movie theaters, and sports arenas.<sup>6</sup> Importantly, the CRA did not designate as a hate crime offenses that occurred while a victim was *not* engaged in one of the identified statutorily protected activities. As such, prosecution under the CRA often proved difficult.<sup>7</sup>

While advocacy groups such as the Anti-Defamation League (ADL), the Southern Poverty Law Center (SPLC), and the National Gay and Lesbian Task Force (NGLTF) began compiling data on bias-motivated violence in the 1980s, official federal data was not collected until 1990 with the passage of the Hate Crimes Statistics Act (HCSA).<sup>8</sup> The HCSA requires the Attorney General to collect, as a part of the Uniform Crime Reports (UCR) Program, data “about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity.”<sup>9</sup> In September 1994, the Violent Crime Control and Law Enforcement Act amended the HCSA to add disabilities as a factor that could be considered as a basis for hate crimes.<sup>10</sup> Although the

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<sup>4</sup> 18 USC § 245(b)(2).

<sup>5</sup> 18 USC § 245(b)(2).

<sup>6</sup> 18 USC § 245(b)(2).

<sup>7</sup> For a successful case using 18 USC 245, see *United States v. Nelson*, 277 F.3d 164 (2<sup>nd</sup> Cir. 2002).

<sup>8</sup> Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (current version at 28 U.S.C. § 534 (2011)). [Hereafter cited as *Hate Crimes Statistics Act (1990)*]

<sup>9</sup> *Hate Crimes Statistics Act (1990)*

<sup>10</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796-2151 (1994) (codified at 42 U.S.C. §§ 13701 – 14223 (2005)).

HCSA mandated hate crimes data collection for five years, the FBI considers the collection of such statistics to be a permanent addition to the UCR Program.<sup>11</sup>

Also included as part of the Violent Crime Control and Enforcement Act of 1994, the Hate Crime Sentencing Enhancement Act<sup>12</sup> (HCSEA) mandated a revision of United States Sentencing Guidelines to provide sentencing enhancements of at least three offense levels for hate crime offenses. The HCSEA included protection for those targeted because of their ethnicity, gender, disability, or sexual orientation, in addition to protecting individuals on the basis of race, color, religion and national origin.<sup>13</sup> Because this sentence enhancement can only be employed when an underlying federal crime is committed, its enactment did not expand the substantive scope of any federal criminal law prohibitions, and it excludes many offenses prosecuted at the state level where hate may be a motive. While the HCSEA did evoke Congressional willingness to address hate crimes, the scope of substantive federal protection remained stagnant.

In 2009 the enactment of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act<sup>14</sup> (HCPA) provided additional authority for federal officials to investigate and prosecute hate crimes. The HCPA closed the loophole in the Civil Rights Act which limited federal hate crime prosecution to cases in which the victim had been engaged in a statutorily protected activity at the time of the crime.<sup>15</sup> The HCPA also authorized the U.S. Department of Justice to investigate and prosecute “certain bias-motivated crimes based on the victim’s actual or perceived sexual orientation, gender, gender identity, or disability.”<sup>16</sup> Finally, the HCPA provided limited jurisdiction “for federal law enforcement officials to investigate certain bias-motivated crimes in states where current law is inadequate”<sup>17</sup> and provided federal aid and technical assistance to

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<sup>11</sup> Pub. Law 101-275, April 23, 1990. Also, <http://www.fbi.gov/ucr/traingd99.pdf>, p. 5. The Church Arson Prevention Act of July 1996 indefinitely extended the mandate for collection of hate crime statistics, making it a permanent part of the UCR program.

<sup>12</sup> Pub. L. No. 103-322, § 280003, 108 Stat. 1796, 2096 (1994).

<sup>13</sup> Pub. L. No. 103-322, § 280003, 108 Stat. 1796, 2096 (1994).

<sup>14</sup> Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4701-4713, 123 Stat. 2835, 2835-2845 (2009). [Hereafter cited as: *Hate Crimes Prevention Act (2009)*]

<sup>15</sup> *Hate Crimes Prevention Act (2009)*. See also: Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (HCPA) *What you need to know*. Anti-Defamation League. Available at: <http://www.adl.org/assets/pdf/combating-hate/What-you-need-to-know-about-HCPA.pdf> (last accessed January 10, 2017) [Hereafter cited as: *HCPA: What you need to know*]

<sup>16</sup> *HCPA: What you need to know*. See also: 18 U.S.C. § 249(a)(1) and 18 U.S.C. § 249(a)(2).

<sup>17</sup> *HCPA: What you need to know*.

state, local, and tribal jurisdictions to help them more effectively investigate, prosecute, and prevent hate crimes from occurring.<sup>18</sup>

## **B. Wisconsin Hate Crimes Statutes**

In addition to federal protections, according to the National Institute of Justice, as of January 2017, forty-nine states have hate crime statutes,<sup>19</sup> though as documented by the Anti-Defamation League, protections can vary widely by state.<sup>20</sup> In Wisconsin, The Wisconsin Hate Crimes Act<sup>21</sup> serves primarily as a penalty enhancement mechanism, acting in conjunction with the federal hate crime laws. Specifically, it states:

(1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):

(a) Commits a crime under chs. 939 to 948.

(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property that is damaged or otherwise affected by the crime under par. (a) in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, whether or not the actor's belief or perception was correct.

(2)(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is \$10,000 and the revised maximum term of imprisonment is one year in the county jail.

(b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is \$10,000 and the revised maximum term of imprisonment is 2 years.

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<sup>18</sup> 42 U.S.C. § 3716 (2009).

<sup>19</sup> National Institute of Justice: Hate Crime (Modified January 5, 2017). Available at: <https://www.nij.gov/topics/crime/hate-crime/pages/welcome.aspx> (last accessed January 10, 2017)

<sup>20</sup> State Hate Crimes Statutory Provisions, Anti-Defamation League. Available at: [http://archive.adl.org/learn/hate\\_crimes\\_laws/map\\_frameset.html](http://archive.adl.org/learn/hate_crimes_laws/map_frameset.html) (last accessed January 10, 2017) [Hereafter cited as: *State Hate Crimes Statutory Provisions*]

<sup>21</sup> W.S.A. 939.645

(c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than \$5,000 and the maximum term of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

(3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).

(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry or proof of any person's perception or belief regarding another's race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

In 1993, Wisconsin's penalty enhancement mechanism was challenged in *Wisconsin v. Mitchell*.<sup>22</sup> The case involved a Wisconsin man whose "sentence for aggravated battery was enhanced because he intentionally selected his victim on account of the victim's race."<sup>23</sup> The defendant challenged Wisconsin's sentencing enhancement as unconstitutional on the grounds that it violated his First Amendment right to free speech and Fourteenth Amendment right to due process. Reversing the ruling of the Wisconsin Supreme Court, the Supreme Court of the United States unanimously upheld the constitutionality of Wisconsin's hate crime penalty enhancement statutes.<sup>24</sup> The Court found:

(1) The First Amendment does not protect violence;

(2) Motive is an acceptable factor to consider in determining sentencing for a convicted defendant. Citing *Tison v. Arizona*, 481 U.S. 137, 156 (1987), the court wrote: "Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."<sup>25</sup>

(3) Hate crime enhancements are in line with other federal anti-discrimination laws which prohibit discrimination on the basis of race, color, religion, sex, or national origin;

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<sup>22</sup> *Wisconsin v. Mitchell* (92-515), 508 U.S. 47 (1993). Available at: <https://www.law.cornell.edu/supct/html/92-515.ZO.html> (last accessed January 10, 2017) [Hereafter cited as *Wisconsin v. Mitchell* (1993)]

<sup>23</sup> *Wisconsin v. Mitchell* (1993).

<sup>24</sup> *Wisconsin v. Mitchell* (1993).

<sup>25</sup> *Wisconsin v. Mitchell* (1993).

(4) It is acceptable for the State to single out “bias inspired conduct because this conduct is thought to inflict greater individual and societal harm.”<sup>26</sup> The Court found that “The State’s desire to redress these perceived harms provides an adequate explanation for its penalty enhancement provision over and above mere disagreement with the offenders’ beliefs or biases.”<sup>27</sup>

(5) Wisconsin’s statute is not unconstitutionally “overbroad.” The Court wrote, “...the prospect of a citizen suppressing his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits a more serious offense against person or property...is simply too speculative a hypothesis to support Mitchell’s overbreadth claim.”<sup>28</sup>

(6) The First Amendment “does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. Evidence of a defendant’s previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like.”<sup>29</sup>

Compared with other states, Wisconsin’s hate crime legislation may be considered relatively broad. Three notable areas in which Wisconsin’s Hate Crime Statutes may be lacking in comparison to other states, however, include: (1) a lack of protection against crimes motivated by gender bias; (2) the absence of any mandate requiring data collection of hate crime statistics; and (3) a lack of required police training regarding bias motivated crimes.<sup>30</sup>

### C. FBI Hate Crime Data

The FBI defines a hate crime as “a traditional offense like murder, arson, or vandalism with an added element of bias. For the purposes of collecting statistics, the FBI has defined a hate crime as a ‘criminal offense against a person or property motivated in whole or in part by an offender’s bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity.’”<sup>31</sup> It must be noted that the FBI acknowledges freedom of speech and individual civil

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<sup>26</sup> *Wisconsin v. Mitchell* (1993).

<sup>27</sup> *Wisconsin v. Mitchell* (1993).

<sup>28</sup> *Wisconsin v. Mitchell* (1993).

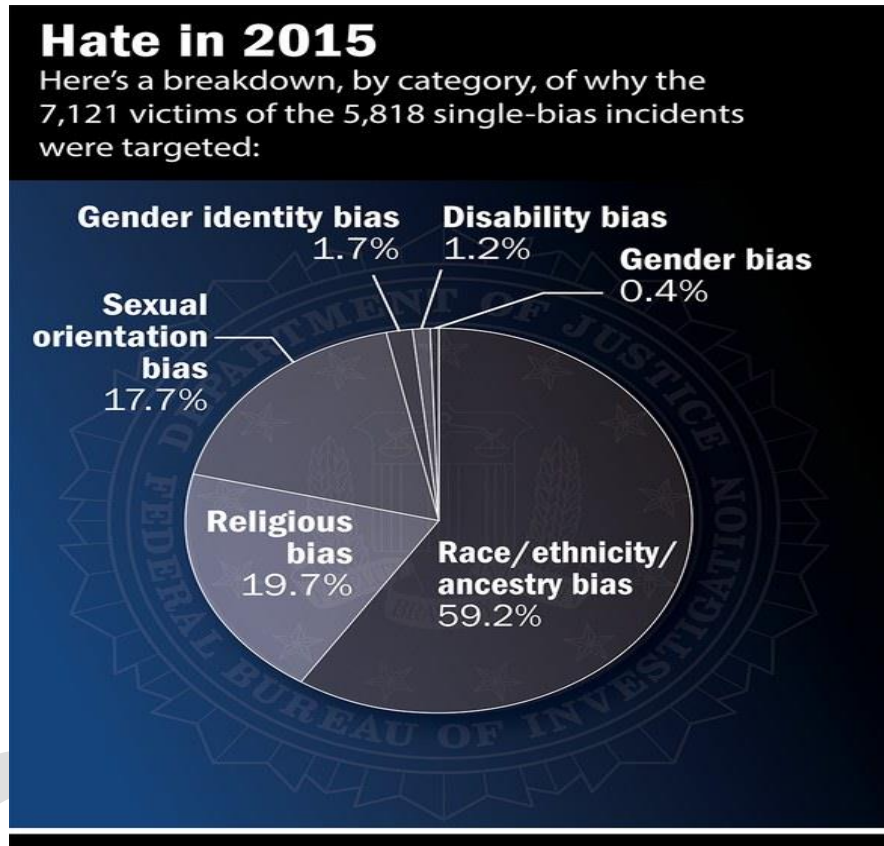
<sup>29</sup> *Wisconsin v. Mitchell* (1993).

<sup>30</sup> *State Hate Crimes Statutory Provisions*

<sup>31</sup> Hate Crimes, Federal Bureau of Investigation. Defining a Hate Crime. (2016). Available at: <https://www.fbi.gov/investigate/civil-rights/hate-crimes>. (Last accessed January 11, 2017)

liberties.<sup>32</sup> Although hate itself is not criminal, acting upon hate with criminal behavior constitutes a hate crime.

In 2015, the FBI reported a total of 5,850 hate crimes.<sup>33</sup> By far, the majority of single-bias incidents were motivated by race/ethnicity/ancestral bias, followed by religious and sexual-orientation-based biases, which were reported at similar rates.<sup>34</sup>



\*From *Hate Crime Statistics, 2015*

Anti-Black/African-American was the race-based category that saw the most bias-motivated incidents in 2015, followed by anti-White and anti-Hispanic/Latino.<sup>35</sup> The most prevalent

<sup>32</sup> 2015 Defining a Hate Crime.

<sup>33</sup> Uniform Crime Report Hate Crime Statistics 2015, Federal Bureau of Investigation. Overview. (2016). Available at: [https://ucr.fbi.gov/hate-crime/2015/topic-pages/incidentsandoffenses\\_final.pdf](https://ucr.fbi.gov/hate-crime/2015/topic-pages/incidentsandoffenses_final.pdf). (Last accessed January 11, 2017).

<sup>34</sup> Uniform Crime Report Hate Crime Statistics 2015, Federal Bureau of Investigation. Single-bias incidents. (2016). Available at: [https://ucr.fbi.gov/hate-crime/2015/topic-pages/incidentsandoffenses\\_final.pdf](https://ucr.fbi.gov/hate-crime/2015/topic-pages/incidentsandoffenses_final.pdf). (Last accessed January 11, 2017).

religious biases were anti-Jewish, anti-Islam, and anti-Catholic.<sup>36</sup> Of special significance to this report is the fact that seven additional religious categories, as well as an anti-Arab category, were added to the FBI reported bias-based incident types in 2015. These include anti-Buddhist, anti-Eastern Orthodox, anti-Hindu, anti-Jehovah's Witness, anti-Mormon, anti-other Christian, and anti-Sikh.<sup>37</sup> This is an important development as the public hearings leading to this report were originally organized in response to the shooting at a Sikh temple in Oak Creek, Wisconsin, in 2013. Further discussion on the challenges faced by religious minorities regarding incidents is presented in the following sections of this report.

It is important to note that the number of reported incidents likely underestimates the actual incidence of hate crime in the United States. Of the 14,997 participating law enforcement agencies across the country, only 1,742 reported hate crime statistics to the FBI in 2015.<sup>38</sup> In Wisconsin, only 25 of 395 participating law enforcement agencies submitted incident reports to the FBI.<sup>39</sup> There were a total of 47 hate crime offenses against people, property, and society in Wisconsin in 2015.<sup>40</sup> When compared to the rest of the country, Wisconsin ranks well below the average of reported hate crimes per resident. This can possibly be attributed to the lack of reporting from 343 participating agencies, which otherwise might shift the state's ranking. Concerns regarding underreporting of hate crime data are discussed in further detail in the following sections of this report.

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<sup>35</sup> Uniform Crime Report Hate Crime Statistics 2015, Federal Bureau of Investigation. Race/Ethnicity/Ancestry Bias. (2016). Available at: [https://ucr.fbi.gov/hate-crime/2015/topic-pages/incidentsandoffenses\\_final.pdf](https://ucr.fbi.gov/hate-crime/2015/topic-pages/incidentsandoffenses_final.pdf). (Last accessed January 11, 2017).

<sup>36</sup> Uniform Crime Report Hate Crime Statistics 2015, Federal Bureau of Investigation. Religious Bias. (2016). Available at: [https://ucr.fbi.gov/hate-crime/2015/topic-pages/incidentsandoffenses\\_final.pdf](https://ucr.fbi.gov/hate-crime/2015/topic-pages/incidentsandoffenses_final.pdf). (Last accessed January 11, 2017).

<sup>37</sup> Latest Hate Crime Statistics Released, Federal Bureau of Investigation. (2016). Available at: <https://www.fbi.gov/news/stories/2015-hate-crime-statistics-released>. (Last accessed January 11, 2017).

<sup>38</sup> Hate Crime Statistics 2015 Overview.

<sup>39</sup> 2015 Hate Crime Statistics, Federal Bureau of Investigation. Agency Hate Crime Reporting by State, 2015. (2016). Available at: <https://ucr.fbi.gov/hate-crime/2015/tables-and-data-declarations/12tabledatadecpdf>. (last accessed January 11, 2017).

<sup>40</sup> 2015 Hate Crime Statistics, Federal Bureau of Investigation. Offenses. (2016). Available at: <https://ucr.fbi.gov/hate-crime/2015/tables-and-data-declarations/11tabledatadecpdf>. (Last accessed January 11, 2017).

## IV. SUMMARY OF PANEL TESTIMONY

The panel discussions on September 12, 2013 in Madison, Wisconsin; and on August 29, 2016 in Milwaukee, WI, included testimony from community members, advocates, legal professionals, scholars, government officials, and law enforcement. Panelists were selected to provide a diverse and balanced overview of concerns regarding hate crime in Wisconsin; they represented viewpoints from the Jewish, Islamic, and Sikh faith communities; immigrant communities; and lesbian, gay, bisexual, and transgender (LGBT) communities. Among other topics, panelists discussed challenges related to appropriately applying hate crime penalty enhancements, protecting free speech, prosecuting hate crime, and addressing victim underreporting. Panelists also discussed solutions such as improved law enforcement training, community education efforts, and the need for improved data collection.

### A. Community Experiences

1. *Current Events*
2. *Targeted Groups*
3. *Individual Stories*

### B. Hate Crime Penalty Enhancements

1. *Purpose*

A primary function of both state and federal hate crimes statutes is to apply penalty enhancements to criminal behavior motivated by bias toward a protected group or class of people. As panelist Ismael Ozanne, Dane County District Attorney explained, penalty enhancements have “...the ability to take a Class B misdemeanor and increase the penalty from 90 days in jail to a year, raise the fine from \$1,000 to \$10,000 or take a Class A misdemeanor, which would be a nine-month misdemeanor, and turning it into a felony, which would have the ability to have a prison sentence attached to it.”<sup>41</sup>

Panelist Miriam Zeidman of the Anti-Defamation League described the purpose and the importance of such enhancements:

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<sup>41</sup> Ozanne Testimony, 2013 *Transcript*, p. 129 lines 16-22.

Hate crimes are uniquely harmful. When a person is targeted for a crime because of his or her immutable characteristic, whether it is his or her race, religion, national origin, gender, sexual orientation, gender identity or disability, it does not just injure that person. It harms the entire community of people who share that characteristic. And it sends the message that they are not welcome, that they are not safe. Bias crimes are designed to intimidate the victim and members of the victim's community, leaving them feeling fearful, isolated, vulnerable and unprotected by the law. Failure to address this unique type of crime often causes an isolated incident to explode into widespread community tension. The damage done by hate crimes, therefore, cannot be measured solely in terms of physical injury or dollars and cents. By making members of minority communities fearful, angry and suspicious of other groups, and of the power structure that is supposed to protect them, these incidents can damage the fabric of our society and fragment communities. Because hate crimes have unique dangers and harms, they require unique tools to address, combat and prevent them.<sup>42</sup>

Madison Police Department detective Dave Gouran concurred that hate crimes are message crimes: “it’s not just a single individual victim that’s affected, it’s perhaps a larger community that they represent.”<sup>43</sup> Ms. Zeidman noted legal justification for providing special protection to victims of such crimes:

Hate crimes are comparable to other status crimes. Many federal and state laws provide different penalties for crimes depending on the victim's particular status. Virtually every criminal code protects -- provides enhanced penalties for crimes directed at the elderly or the very young or teachers on school grounds or law enforcement officials. Legislators have legitimate and neutral justifications for selective protection of certain categories of victims, and enhanced criminal penalties, based on their judgment of the societal harm that these crimes cause.<sup>44</sup>

Finally, Ms. Zeidman testified that hate crime penalty enhancements are designed to protect citizens of all backgrounds: “It is not focused on just minority communities and, in fact, of the hate crimes that were racially based reported by the FBI in 2011, 16.7% stemmed from anti-white bias. The hate crime laws are color blind. They are religion blind. They are national origin blind.” As such, Ms. Zeidman concluded that neutrally-applied hate crime laws are an appropriate mechanism for protecting individuals and communities from bias-motivated criminal acts.

## **2. Protecting Free Speech**

Panelist Rick Esenberg of the Wisconsin Institute for Law and Liberty, raised caution that imposing enhanced penalties for certain criminal behaviors based on the motivation of the

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<sup>42</sup> Zeidman Testimony, 2013 *Transcript*, p. 10 line 24 through p. 11 line 23. See also: Gouran Testimony, 2013 *Transcript*, p. 185 lines 05-12

<sup>43</sup> Lehman Testimony, 2013 *Transcript*, p. 185 lines 06-08

<sup>44</sup> Zeidman Testimony, 2013 *Transcript*, p. 11 line 24 through p. 12 line 11

offender could create additional, unintended civil rights problems.<sup>45</sup> Citing concerns of free speech and equal protection, Mr. Esenberg testified that it is problematic to identify *any* specific personal characteristic for enhanced protection under hate crime legislation.<sup>46</sup> He stated, “the idea of punishing people more severely, or perhaps charging them at all, because of what they thought or said while committing a crime ought to give us pause. It raises the spectra of unequal treatment and presents difficult questions of proof and prosecution.”<sup>47</sup>

For these reasons, Mr. Esenberg warned that considering hate motivations in criminal investigations could lead to unfair prosecution of individual’s personal character and beliefs, rather than his or her actions.<sup>48</sup> Furthermore, he suggested that the task of deciding “what types of group based animus constitute hate”<sup>49</sup> is extremely unlikely to be accomplished in a “neutral fashion”<sup>50</sup> and thus itself indicates a biased, “state sanctioned war against attitudes.”<sup>51</sup> As such, Mr. Esenberg testified that any “campaign against intolerance always risks itself becoming an exercise in intolerance,”<sup>52</sup> and suggested that such a danger is most concerning because “this time the threat won’t come from the occasional act of a disturbed person but from officials imbued with the coercive power and persuasive authority of the state.”<sup>53</sup>

Ms. Zeidman responded to these concerns by noting that looking into the personal characteristics of a defendant is “not what hate crimes do. Hate crime laws are not intended for law enforcement to examine the type of person a particular perpetrator is.”<sup>54</sup> She clarified, “the investigation is about whether the perpetrator intentionally targeted the victim based on one of those protected characteristics.”<sup>55</sup> For these reasons, she concluded, and cited legal precedence to support, the congruence of hate crime laws with first amendment rights:

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<sup>45</sup> Esenberg Testimony, 2013 *Transcript*, p. 23 lines 04 -24

<sup>46</sup> Esenberg Testimony, 2013 *Transcript*, p. 25 lines 09-17; see also 2013 *Transcript*, p. 24 line 18 through p. 25 line 05

<sup>47</sup> Esenberg Testimony, 2013 *Transcript*, p. 28 lines 04 -10; see also *Transcript*, p. 25 lines 04-17

<sup>48</sup> Esenberg Testimony, 2013 *Transcript*, p 50 line 21 through p. 51 line 03. See also: Ozanne Testimony, 2013 *Transcript*, p. 172 lines 09-17

<sup>49</sup> Esenberg Testimony, 2013 *Transcript*, p. 29 lines 02 -03

<sup>50</sup> Esenberg Testimony, 2013 *Transcript*, p. 28 line 11 through p. 29 line 21

<sup>51</sup> Esenberg Testimony, 2013 *Transcript*, p. 23 line 04 through p. 30 line 23

<sup>52</sup> Esenberg Testimony, 2013 *Transcript*, p. 23 lines 04 -19

<sup>53</sup> Esenberg Testimony, 2013 *Transcript*, p. 34 lines 01 -12

<sup>54</sup> Zeidman Testimony, 2013 *Transcript*, p. 51 lines 16-19

<sup>55</sup> Zeidman Testimony, 2013 *Transcript*, p. 51 lines 19-22

Hate crime laws are consistent with the First Amendment. The First Amendment does not protect violence, and it does not prevent the government from imposing criminal penalties for violent discriminatory conduct directed against victims on the basis of their personal characteristics. Hate crime laws do not punish speech. Americans are free to think, say and believe whatever they want. It is only when an individual commits a crime because of those biased beliefs and intentionally targets another for violence or vandalism that a hate crime statute can be triggered. In *Wisconsin v. Mitchell* the United States Supreme Court unanimously upheld the constitutionality of the penalty-enhancement statute, effectively removing any doubt that state legislatures may properly increase the penalties for criminal activity in which the victim is intentionally targeted because of his or her race, religion, sexual orientation, gender, or ethnicity.<sup>56</sup>

Another panelist, Jeannine Bell, Professor of Law and Fellow at the Maurer School of Law also provided testimony regarding the congruence of free speech rights with hate crime laws. Ms. Bell's testimony was based on her research into a specialized hate crimes police unit, as published in the 2004 book *Policing Hatred* by the New York University Press.<sup>57</sup> Her research included more than five months of direct observation; accompaniment of officers on trainings, in court, and during surveillance activities; review of over 700 files spanning an 18 year period; and direct formal interviews with officers, prosecutors, and victim advocates.<sup>58</sup> Ms. Bell testified that in her research she found law enforcement officers conducting hate crime investigations "to be very careful with respect to the First Amendment,"<sup>59</sup> stating that in the 700 cases she reviewed, she found no evidence of police officers examining a perpetrator's personal background and affiliations in order to apply hate crime enhancement penalties.<sup>60</sup> Ms. Bell described how she found law enforcement to approach hate crimes investigations:

In order to sort through the incidents, officers developed a shorthand for the types of incidents that could be reported as hate crimes that are really something else. And I divided these into several categories, ranging from traffic accidents to neighbor disputes, including drug deals gone bad and fights. I call these cases the typical non-hate crime. And officers eliminated each of these explanations, and it's only after they do that that they look to the language used during the crime.<sup>61</sup>

Through this work Ms. Bell concluded that "Slurs and epithets were not dispositive of motivation to the detectives . . . We use bad language all the time, and focusing on slurs wouldn't allow detectives to sufficiently separate out bias-motivated cases from cases that were not bias

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<sup>56</sup> Zeidman Testimony, 2013 *Transcript*, p. 12 line 12 through p. 13 line 07

<sup>57</sup> Bell Testimony, 2013 *Transcript*, p. 35 lines 15-22. See also: Bell, Jeannine. *Policing Hatred: Law Enforcement, Civil Rights, and Hate Crime*. NYU Press. (2002)

<sup>58</sup> Bell Testimony, 2013 *Transcript*, p. 36 line 22 through page 37 line 10

<sup>59</sup> Bell Testimony, 2013 *Transcript*, p. 38 lines 09-12

<sup>60</sup> Bell Testimony, 2013 *Transcript*, p. 52 lines 17-23

<sup>61</sup> Bell Testimony, 2013 *Transcript*, p. 39 lines 11-22

motivated.”<sup>62</sup> As one detective explained to her: “racial words are very violent, racial words may be hate incidents, but words aren't a crime.”<sup>63</sup> However, Ms. Bell cautioned that it is very important for detectives be appropriately trained, noting: “I studied a large well-funded and well-trained unit. If that's not happening, then the types of routines that I saw that actually respect the First Amendment may not occur.”

Finally, panelist Keith Bailey of Milwaukee Matters, a community organization established to aid victims of violence and their families, cited both the burden of proof necessary to apply penalty enhancements and the historical pattern of violent intolerance toward various social groups in the United States as an acceptable, neutral justification for applying penalty enhancements to hate motivated crime, that do not impinge on free speech protections. He stated, “the enhancer has to be proven, it's got to be a proven thing, and I think if it is definitely proven that someone hurt someone or destroyed property as a result of someone being different from them, with our American history, I think that they should definitely be penalized accordingly.”<sup>64</sup>

### 3. *Effectiveness of Enhancers*

In order to apply penalty enhancements, hate crime law must clearly define which personal characteristics are to receive such additional protection. In the State of Wisconsin, Ms. Zeidman noted that while strong hate crimes laws do exist, “Wisconsin’s hate crime law does not include crimes where the victim is targeted because of gender or gender identity.”<sup>65</sup> Ms. Zeidman also raised concern that Wisconsin does not offer protection for victims targeted because of their association with a person of a protected category or perceived to be of a protected category—such as, a white woman attacked not because of her own race but because she is dating an African American, or a child targeted for a crime not because of his own sexual orientation, but because his mother is a lesbian.<sup>66</sup> Ms. Zeidman recommended that Wisconsin’s law be altered to include both of these categories.<sup>67</sup>

Panelist Reggie Jackson of America’s Black Holocaust Museum testified that Wisconsin’s hate crime statutes could also be more effective if the existing penalty enhancers were reclassified as sentencing aggravators.<sup>68</sup> He described two concerns with penalty enhancement provisions. First,

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<sup>62</sup> Bell Testimony, 2013 *Transcript*, p. 40 lines 08-11

<sup>63</sup> Bell Testimony, 2013 *Transcript*, p. 40 lines 05-07

<sup>64</sup> Bailey Testimony, 2013 *Transcript*, p. 120 line 07 through p. 121 line 18

<sup>65</sup> Zeidman Testimony, 2013 *Transcript*, p. 14 lines 03 - 20

<sup>66</sup> Zeidman Testimony, 2013 *Transcript*, p. 15 line 13 through p. 16 line 05

<sup>67</sup> Zeidman Testimony, 2013 *Transcript*, pp. 14-16

<sup>68</sup> Jackson Testimony, 2016 *Transcript*, p. 76 line 21- p. 78 line 11

“a penalty enhancer is used as a tool to scare defendants into plea bargaining, and is often dropped after a plea deal is made.”<sup>69</sup> In contrast, sentencing aggravators, “[play] no role in the trial or plea bargaining phase.”<sup>70</sup> Instead, “a judge can use it to impose a longer sentence during the penalty phase.”<sup>71</sup> The second challenge with appropriately implementing penalty enhancers is that in order to be applied, “the prosecutor must provide proof of motive beyond a reasonable doubt.”<sup>72</sup> He noted, “in most hate crime cases, minus a statement directly attributable to the defendant showing bias, it is nearly impossible to get a [hate crime] conviction.”<sup>73</sup> Jackson cited a 2005 Marquette Law Review article, “Put to the Proof: Evidentiary Considerations in Wisconsin Hate crime Prosecutions” by Evan M. Read, which suggested that “the questions involved in trying to prove a motive of an offender put the effectiveness of the statute in doubt.”<sup>74</sup> Jackson pointed out that in 2001, Wisconsin did reclassify a number of penalty enhancers as sentencing aggravators under Wisconsin Act 109, though under this legislation hate crime was retained as a penalty enhancer.<sup>75</sup>

Overall, testimony indicated that hate crimes have a broad impact on communities and a historical significance extending far beyond the damage caused to the individual victims directly targeted. As such, hate crime penalty enhancements are an appropriate and legitimate response to these crimes. State hate crime laws vary widely however, though their application is often much farther reaching than federal hate crime statutes. Therefore, state laws also perform a critical role in addressing this issue. To this end, the Committee heard testimony regarding two specific gaps in Wisconsin hate crime laws that should be addressed in future legislation: protection for crime victims targeted because of their gender or gender identity, and for those targeted because of their association with protected classes of individuals. The effectiveness of the legislation may be further strengthened through the use of sentencing aggravators, in lieu of penalty enhancement. The Committee also heard caution that care must be taken to ensure hate crime penalty enhancements are limited to criminal actions; and that law enforcement officers are sufficiently trained to prevent hate crime investigations from imposing on constitutionally protected personal attitudes, beliefs, and freedom of speech.

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<sup>69</sup> Jackson Testimony, 2016 *Transcript*, p. 77 lines 01-09

<sup>70</sup> Jackson Testimony, 2016 *Transcript*, p. 77 lines 01-09

<sup>71</sup> Jackson Testimony, 2016 *Transcript*, p. 77 lines 01-09

<sup>72</sup> Jackson Testimony, 2016 *Transcript*, p. 76 line 21-p.77 line 01

<sup>73</sup> Jackson Testimony, *Transcript*, p. 78 lines 12-22

<sup>74</sup> Jackson Testimony, 2016 *Transcript*, p. 77 line 23 – p. 78 line 22

<sup>75</sup> Jackson Testimony, 2016 *Transcript*, p. 77 lines 10-16

## C. Prosecuting Hate Crime

A March 2013 report of the Bureau of Justice Statistics estimated that between 2007 and 2011, just 4% of hate crimes ever resulted in an arrest.<sup>76</sup> The Committee heard testimony regarding several challenges facing law enforcement officials which may contribute to this low incidence of hate crime arrests and prosecutions. These challenges include victim underreporting, the discretion required to distinguish between hate incidents and hate crimes, and difficulties in establishing the level of proof necessary to apply relevant penalty enhancements.

### 1. Victim Underreporting

According to the U.S. Department of Justice, approximately 35% of hate crimes were reported to law enforcement between 2007 and 2011—a statistic which marked an 11% decline in reporting between 2003 and 2006.<sup>77</sup> The same study cited victim belief that the “police could not or would not help” as the most common reason why these crimes were not reported. Victim belief that the act was either “a private matter,” or had been “dealt with another way” was the second most commonly cited reason for underreporting between 2007 and 2011.<sup>78</sup>

Such victim underreporting is a significant problem in addressing hate crime. As Supervisory Special Agent of the Federal Bureau of Investigation, panelist Chadwick Elgersma, noted “...if we're not aware of the information there is nothing that we can do. So we need the information in order to build a federal case that can be presented to the U.S. Attorney Office.”<sup>79</sup> Panelists suggested a number of additional factors that may contribute to victim underreporting. These include:

- privacy concerns regarding potentially sensitive personal information such as immigration status and sexual orientation;
- language barriers;
- fear of the police;
- fear of reprisal;

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<sup>76</sup> Sandholtz, Langton, and Planty. “Special Report: Hate Crime Victimization, 2003-2011.” *Bureau of Justice Statistics*, March 2013. p. 05 table 07. Available at: <http://www.bjs.gov/content/pub/pdf/hcv0311.pdf> (last accessed May 21, 2015) [Hereafter *BJS Special Report 2013*]

<sup>77</sup> *BJS Special Report 2013*. p. 05, table 07

<sup>78</sup> *BJS Special Report 2013*. p. 06, figure 06

<sup>79</sup> Elgersma testimony, 2013 *Transcript*, p. 128 lines 12-19; *see also*, Santelle testimony, 2013 *Transcript*, p. 154 line 17 – p. 155 line 05

- lack of awareness as to what constitutes a hate crime.<sup>80</sup>

Panelist Kathy Flores of Diverse & Resilient, a statewide LGBTQ advocacy and support initiative, cited a study of the National Coalition of Anti-Violence Programs, which found that “only 41 percent of survivors reported the violence they experienced to police; and of those who reported, 80 percent of survivors said police were indifferent or hostile to them.”<sup>81</sup> Additionally, she noted that 30 percent of those 80 percent “also experienced physical violence and the use of slurs of bias language and some sexual violence by police.”<sup>82</sup> She concluded:

is it any wonder why hate crimes in this community are so underreported when local responses continue to be so re-victimizing? LGBTQ individuals and survivors can experience bias when working with the criminal justice system which discourages them from reporting. And LGBTQ people of color and undocumented LGBTQ people experience that discrimination and harassment at an even higher rate.<sup>83</sup>

In order to address the issue of community trust in law enforcement and awareness of people’s rights to protection from hate crime, U.S. Attorney for the Eastern District of Wisconsin, James Santelle, noted several recent outreach efforts in collaboration with the U.S. Department of Justice, including with the LGBT and Muslim communities in Milwaukee, the Hmong community in Oshkosh, and the Sikh community in Oak Creek; as well as some potential future outreach in the Jewish community in Algoma.<sup>84</sup> Mr. Santelle recalled that after one event, he received several comments from otherwise very active and engaged community members who said that they had been unaware of what services could be available to them.<sup>85</sup> He concluded, “it’s not that the hate crimes are not occurring, I suspect they are...some of the relevant public may not know about the process to report them and may not appreciate what the government will do in the appropriate circumstance to prosecute those cases.”<sup>86</sup>

Detective David Gouran and Captain Mary Schauff of the Madison Police Department also described efforts to address underreporting challenges in their department, including establishing a department policy against probing for citizenship status among crime victims and witnesses, so

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<sup>80</sup> Zeidman testimony, 2013 *Transcript*, p. 17 lines 22 through p. 18 line 09; *see also* Ozanne testimony, 2013 *Transcript*, p. 152 lines 01-20; Santelle testimony, 2013 *Transcript*, p. 154 line 17 – p. 155 line 05; Gouran testimony, 2013 *Transcript* p. 182 line 23 – p. 183 line 06

<sup>81</sup> Flores Testimony, 2016 *Transcript*, p. 115 line 13 – p. 116 line 13

<sup>82</sup> Flores Testimony, 2016 *Transcript*, p. 115 line 13 – p. 116 line 13

<sup>83</sup> Flores Testimony, 2016 *Transcript*, p. 115 line 13 – p. 116 line 13

<sup>84</sup> Santelle testimony, 2013 *Transcript*, p. 138 line 20 – p. 146 line 12; p. 161 line 20 – p. 163 line 10

<sup>85</sup> Santelle testimony, 2013 *Transcript*, p. 162 line 02 – p. 163 line 11

<sup>86</sup> Santelle testimony, 2013 *Transcript*, p. 163 lines 01-10

as not to deter people from coming forward with information or when they need help.<sup>87</sup> They also have community outreach programs, including youth activities, and outreach on the Spanish language radio station to help build community trust, while off duty officers work jobs at local Jewish temples during the holidays to help deter anti-Semitic vandalism.<sup>88</sup> Detective Gouran testified that these activities “[inspire] confidence in the police department ... that you're going to respond and try to solve these situations.”<sup>89</sup> Captain Schauf noted that developing these relationships can have the added benefit of helping law enforcement be more proactive in addressing hate crime.<sup>90</sup>

Finally, panelists suggested the way that hate crime investigations are conducted can help to address victim underreporting. Detective Gouran of the Madison Police Department and Officer Karla Lehmann of the Milwaukee Police Department both recommended that hate crime investigations be approached in a similar manner to other “sensitive crimes” such as sexual assault and child abuse. Detective Gouran remarked, “it requires you employ more thorough interviews of your victims, witnesses to elicit the full information.”<sup>91</sup> Officer Lehmann noted the importance of community collaboration in addressing such sensitive crimes, “having all of the people that have a stake in this at the same table and communicating with one another.”<sup>92</sup>

## 2. *Hate Incidents verses Hate Crime*

As noted in the previous section of this report, hate crime laws and their related penalty enhancements only apply when an underlying criminal act has taken place. However, the Committee heard testimony indicating that such a distinction is not always clear or easy for law enforcement to make. For example, panelist Steve Starkey, Executive Director of the South Central Wisconsin LGBT Community Center OutReach, described an incident in which a same sex couple at a public park in Madison was celebrating a commitment ceremony. Protesters arrived at the event holding signs saying that they were going to “burn in hell.” They became increasingly vocal, and reportedly started harassing the children at the event until police arrived and told them they needed to “back off.”<sup>93</sup> Panelists discussed this and other examples of

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<sup>87</sup> Gouran testimony, 2013 *Transcript*. p. 187 lines 10-15

<sup>88</sup> Gouran testimony, 2013 *Transcript*. p. 187 lines 01-23

<sup>89</sup> Gouran testimony, 2013 *Transcript*. p. 187 lines 21-23; See also testimony of Captain Mary Schauf of the Madison Police Department. 2013 *Transcript* p. 176 line 15 – p. 177 line 12

<sup>90</sup> Schauf testimony, 2013 *Transcript*. p. 176 line 15 – p. 177 line 12

<sup>91</sup> Gouran testimony, 2013 *Transcript*. p. 182 lines 15-22 ; *see also* testimony of Officer Karla Lehmann, p. 192 line 16 – p. 193 line 18

<sup>92</sup> Lehmann testimony, 2013 *Transcript*, p. 193 lines 03-18

<sup>93</sup> Starkey Testimony, 2013 *Transcript*, p. 79

situations in which it may be unclear as to when hateful speech should be protected by the First Amendment, and when it ought to be addressed as criminal. In reflecting on this distinction, Mr. Starkey suggested: “When they start harassing people and move close ... that's more of a threatening kind of a gesture, and I think that that would be ... the line where they've crossed it if they're threatening, harassing people. Just standing there with a placard that has their religious view ... that's one thing, but I think they crossed the line in that case.”<sup>94</sup>

Similarly, Dr. Donald Downs Professor of Political Science, Law, and Journalism at the University of Wisconsin-Madison, cited a case in which, after a long-standing conflict with a neighbor involving hate speech, a Wisconsin man was finally arrested for disorderly conduct.<sup>95</sup> The man was able to argue that he was arrested for speech, and punished for the viewpoint behind his speech, rather than disorderly conduct itself.<sup>96</sup> Dr. Downs concluded, “when the criminal conduct itself is a form of speech it gets a little bit grayer...but I think, regardless of that, for the most part, the Supreme Court got it right in the *Mitchell* case.”<sup>97</sup> Some panelists suggested that there are situations in which speech should be prohibited, particularly when it involves harassment and threats. For example, Kathy Flores of the LGBTQ advocacy organization Diverse & Resilient, noted that “hate violence isn’t always physical...there are no strong laws currently in place to monitor hate violence through what we’ve seen as speech and protect people from the constant barrage and verbal harassment and threats.”<sup>98</sup> She argued that constant harassment and intimidation have serious consequences, impacting the mental health, wellbeing, and sense of safety of particularly marginalized community members.<sup>99</sup> Such fear and mental health consequences may be well-justified. Panelist Jonathan Scharrer of the Restorative Justice Project at the University of Wisconsin School of Law noted that “[hate] actions frequently start as low-level harassment and then escalate into more extreme forms of violence or criminal acts.”<sup>100</sup> Ms. Flores concluded, “we need to expand the definition of hate violence to include discrimination, harassment, and other nonphysical forms of violence.”<sup>101</sup>

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<sup>94</sup> Starkey Testimony, 2013 *Transcript*, p. 88 lines 11-21

<sup>95</sup> Downs Testimony, 2016 *Transcript*, p. 14 lines 07-23

<sup>96</sup> Downs Testimony, 2016 *Transcript*, p. 14 lines 07-23

<sup>97</sup> Downs Testimony, 2016 *Transcript*, p. 14 lines 07-23; See reference to *Wisconsin v. Mitchell*, discussed in the introduction section of this report.

<sup>98</sup> Flores Testimony, 2016 *Transcript*, p. 116 line 14 – p. 118 line 04

<sup>99</sup> Flores Testimony, 2016 *Transcript*, p. 116 line 14 – p. 118 line 04

<sup>100</sup> Scharrer Testimony, 2016 *Transcript*, p. 28 lines 05-09

<sup>101</sup> Flores Testimony, 2016 *Transcript*, p. 116 line 14 – p. 118 line 04

In addition to determining when constitutionally protected free speech crosses the line into criminal behavior, several panelists also discussed the need to address organized hate activity that could *incite* violence or other criminal activity. Mr. Starkey suggested, “I agree that institutional racism, homophobia, anti-Semitism, this should be curtailed by the law. If an individual has those feelings and, you know, says things or does things that are hateful, that's one thing, but when there are organizations and their whole purpose is to threaten, intimidate, incite people to do hateful acts towards a particular group, it seems that that should be illegal.”<sup>102</sup> In a similar perspective, Captain Mary Schauff of the Madison Police Department brought light to the perplexing challenge police have of identifying hateful speech and motivation by attempting to monitor groups that use social media to prepare organized reactions to public events that clash with their views. Although diverse manifestations of opinion are common in Madison, Captain Schauff emphasized the role of social media and the Internet in causing bias-based actions by explaining that “...there is still that ongoing current through social media, the Internet, where some people...seem to have this freedom to say whatever they want to, to essentially try to incite others...that kind of speech can inflame certain individuals to take action.”<sup>103</sup>

Still, not all panelists agreed. Again, Mr. Rick Esenberg, of the Wisconsin Institute for Law and Liberty cautioned: “whenever we embark on a state sanctioned war against attitudes, the tensions between the First Amendment and the anti-hate project are inevitable.”<sup>104</sup> Despite these concerns, panelist Miriam Zeidman of the Anti-Defamation League argued that a clear line could be drawn, referencing a 1993 Supreme Court decision as precedent: “I think that there is a difference between speech and the harassment that you mentioned, so when there is action or words that rise to the level of harassment, that crosses a line, just like when there is a situation where a person's bias crosses a line into action, that also crosses a line, and then they become a hate crime. And that's similar to the anti-discrimination laws that we see present and the United States Supreme Court recognized in *Wisconsin v. Mitchell*.”<sup>105</sup>

### **3. Demonstrating Bias Motivation**

In addition to challenges regarding victim underreporting and distinguishing hate acts from hate crimes, the Committee heard testimony regarding the challenges law enforcement often face in proving bias-motivation during criminal investigations. Panelist Ismael Ozanne, Dane County

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<sup>102</sup> Starkey Testimony, 2013 *Transcript*, p. 95 lines 05-13. See also Saeed Testimony, 2013 *Transcript*, p. 93 line 15 through p. 94 line 11; Schauff Testimony, 2013 *Transcript*, p. 178 lines 04-22; and Ozanne Testimony, 2013 *Transcript*, p. 172 line 14 through p. 173 line 06 for similar examples.

<sup>103</sup> Schauff Testimony, 2013 *Transcript*, p. 178 lines 01-22.

<sup>104</sup> Esenberg Testimony, 2013 *Transcript*, p. 25 lines 09 -12

<sup>105</sup> Zeidman Testimony, 2013 *Transcript*, p. 53 lines 13-24. For more information on *Wisconsin v. Mitchell*, see also: <http://www.law.cornell.edu/supct/html/92-515.ZO.html> (last accessed Jan. 06, 2015)

District Attorney described: “how are we to tell that criminal damage to property is a hate crime? Now, if they're going to use a swastika ... then maybe there is a nexus. Otherwise, if it's just ... ‘we're going to go throw bricks through a window,’ even if you catch the person who threw the brick, they're not likely to say, ‘well, I threw it because ... I believe that person living there is Jewish or gay.’”<sup>106</sup> As law enforcement seeks to answer such questions about a defendant’s motives in potential hate crimes, Mr. Ozanne continued, “we're having a debate right now as to privacy, privacy issues and how much of your privacy do you want to give up in order for us, the government, to be able to address these crimes? And there is a very thin line with what is your freedom of speech and what is your belief and what then could turn into ... a hate crime.”<sup>107</sup>

Madison Police Captain Mary Schauff testified that, despite regular screening for indicators of bias-motivation in their crime reports, “...finding that motivation, that intent of the offender...can be extremely difficult to do.”<sup>108</sup> Mr. Ozanne noted that few defendants provide information regarding their motives.<sup>109</sup> Penalty enhancement can be applied when the courts come across this information, though such cases are rare: “That’s not that we don’t address the seriousness of the offenses, I just think it’s a proof issue for DA’s in the State of Wisconsin.”<sup>110</sup> In cases when information on biased-based intent is not available, criminal offenses may still be charged as such; they just would not include the hate crime penalty enhancement.<sup>111</sup> Mr. Ozanne added that resource limitations may prevent law enforcement from being able to fully investigate the potential for bias-motivations in criminal cases.<sup>112</sup> For example, Dane County has yet to establish a cyber unit that could focus on investigating criminal motivation through social media.<sup>113</sup> Mr. Ozanne stated: “If somebody actually has an incident where they’re caught, they may take down their Facebook page. They may take the pictures off the Facebook page that are showing them displaying firearms or standing around with swastikas or other hate material.”<sup>114</sup> Without a cyber-unit to act quickly, such evidence may be lost.

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<sup>106</sup> Ozanne Testimony, 2013 *Transcript*, p. 164 lines 07-19

<sup>107</sup> Ozanne Testimony, 2013 *Transcript*, p. 172 lines 09-17

<sup>108</sup> Schauff Testimony, 2013 *Transcript*, p. 175 lines 12-18

<sup>109</sup> Ozanne Testimony, 2013 *Transcript*, p. 129 line 11 – p. 130 line 25

<sup>110</sup> Ozanne Testimony, 2013 *Transcript*, p. 129 line 11 – p. 130 line 25

<sup>111</sup> Ozanne Testimony, 2013 *Transcript*, p. 165 line 24 – p. 166 line 14

<sup>112</sup> Ozanne Testimony, 2013 *Transcript*, p. 166 line 15 – p. 167 line 24

<sup>113</sup> Ozanne Testimony, 2013 *Transcript*, p. 166 lines 16-24

<sup>114</sup> Ozanne Testimony, 2013 *Transcript*, p. 171 lines 05-16

Dr. Donald Downs cited a number of typical sources for proving bias in hate crime cases: confessions or admissions; contemporaneous statements made during the course of a crime; membership in hate organizations such as the Aryan Brotherhood; racist literature found in the home; tattoos, clothing, and other similar indicators.<sup>115</sup> He noted, the “U.S. Supreme Court has held that using such evidence is okay as long as it is consistent with First Amendment values, but also just regular criminal law standards of evidence.”<sup>116</sup> He pointed out that character evidence and evidence of prior acts cannot be introduced as evidence of hate-motivated bias.<sup>117</sup> He concluded, “All these standards of criminal evidence limit what kind of evidence can be used in a trial; and that’s another reason that prosecutors are careful when it comes to bringing a case. They want to make sure they have high evidence of causation as well as clear evidence of prejudice.”<sup>118</sup>

## **D. Solutions**

- 1. Law Enforcement Training**
- 2. Community Education**
- 3. Improved Data Collection**

In addition to providing enhanced penalties for hate crime offenses, federal hate crime law also serves to manage hate crime data collection.<sup>119</sup> Ms. Zeidman of the Anti-Defamation league described the importance of collecting and analyzing such hate crime data: “collection of data is indispensable to counteract violent bigotry. We rely on statistics to identify patterns, analyze trends and ultimately to create solutions, legislative and otherwise. Data collection raises public

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<sup>115</sup> Downs Testimony, 2016 *Transcript*, p. 20 line 25 – p. 22 line 03

<sup>116</sup> Downs Testimony, 2016 *Transcript*, p. 21 lines 09-13

<sup>117</sup> Downs Testimony, 2016 *Transcript*, p. 21 lines 14-22

<sup>118</sup> Downs Testimony, 2016 *Transcript*, p. 21 line 23 – p. 22 line 03

<sup>119</sup> 28 U.S.C. § 534 The Hate Crime Statistics Act requires that the Attorney General gather annual data “about crimes that manifest evidence of prejudice based on race, gender and gender identity, religion, disability, sexual orientation, or ethnicity; including where appropriate the crimes of murder, non-negligent manslaughter, forcible rape, aggravated assault, simple assault, intimidation, arson, and destruction, damage or vandalism of property.” More information available at: [http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012/resource-pages/hate-crime-statistics-act/hatecrimestatisticsact\\_final](http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012/resource-pages/hate-crime-statistics-act/hatecrimestatisticsact_final) (last accessed Feb. 02, 2015)

awareness of the problem and sparks improvements in the local response of the criminal justice system to hate violence.<sup>120</sup>

The two primary sources of federal hate crime data in the United States are The National Crime Victimization Survey (NCVS), and the Uniform Crime Reports (UCR), both administered through the U.S. Department of Justice.<sup>121</sup> Both of these reports capture data about crimes motivated by bias against federally protected classes, though the two data sets have some key differences.<sup>122</sup> The NCVS is based on interviews of a nationally representative sample of approximately 90,000 households, including approximately 160,000 people.<sup>123</sup> Managed by the Bureau of Justice Statistics, it captures information about both crimes that were reported to the police and crimes that were not. In order for a crime to be classified as a hate crime in the NCVS, the victim must report at least one of three types of evidence that the act was motivated by hate: (1) the offender used hate language; (2) the offender left behind hate symbols; or (3) police investigators confirmed that the incident was hate crime.<sup>124</sup> The UCR in contrast, is based on a national collection of statistical data submitted by “more than 18,000 city, university and college, county, state, tribal, and federal law enforcement agencies voluntarily reporting data on crimes brought to their attention”<sup>125</sup> Managed by the Federal Bureau of Investigation, the hate crime data compiled in the UCR records only crimes that have been reported to law enforcement, and were found to be motivated by bias against the one or more of the required protected classes.<sup>126</sup>

Despite the importance of collecting complete and accurate hate crime data, the Committee heard testimony regarding a number of challenges that threaten these efforts, including underreporting

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<sup>120</sup> Zeidman testimony, 2013 *Transcript*, p. 16 lines 13-20

<sup>121</sup> U.S. Department of Justice Federal Bureau of Investigation *Crime in the United States 2004*, Appendix IV – The Nation’s Two Crime Measures. Available at: [https://www2.fbi.gov/ucr/cius\\_04/appendices/appendix\\_04.html](https://www2.fbi.gov/ucr/cius_04/appendices/appendix_04.html) (last accessed Feb. 05, 2015)

<sup>122</sup> U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division. *Crime in the United States 2013*, Hate Crime Statistics. Available at: [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/resource-pages/hate-crime/hatecrimeholder\\_final](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/resource-pages/hate-crime/hatecrimeholder_final) (last accessed Feb. 05, 2015) See also Bureau of Justice Statistics: Hate Crime. Available at: <http://www.bjs.gov/index.cfm?ty=tp&tid=37> (last accessed Feb 05, 2015)

<sup>123</sup> Bureau of Justice Statistics, Data Collection: National Crime Victimization Survey. Available at: <http://www.bjs.gov/index.cfm?ty=dc&tid=245> (last accessed Feb. 05, 2015)

<sup>124</sup> Bureau of Justice Statistics: Hate Crime. Available at: <http://www.bjs.gov/index.cfm?ty=tp&tid=37> (last accessed Dec. 29, 2014)

<sup>125</sup> U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division. *Crime in the United States 2013*, About UCR. Available at: <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/about-ucr> (last accessed Feb. 02, 2015)

<sup>126</sup> U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division. *Crime in the United States 2013*, Hate Crime Statistics. Available at: [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/resource-pages/hate-crime/hatecrimeholder\\_final](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/resource-pages/hate-crime/hatecrimeholder_final) (last accessed Feb. 05, 2015). See also: U.S. Department of Justice Federal Bureau of Investigation *Crime in the United States 2004*, Appendix IV – The Nation’s Two Crime Measures. Available at: [https://www2.fbi.gov/ucr/cius\\_04/appendices/appendix\\_04.html](https://www2.fbi.gov/ucr/cius_04/appendices/appendix_04.html) (last accessed Feb. 05, 2015)

on the part of both victims and law enforcement, and lack of consistency in reporting structures and analysis between law enforcement agencies.

Panelist Chadwick Elgersma, a Supervisory Special Agent from the Federal Bureau of Investigation, described the difficulty in identifying sources of unreported data. On noting a decline in reported hate crime incidents in Wisconsin between 2010 and 2011, he said: "...these are the numbers that are reported to the FBI from law enforcement, so it's hard to tell if there is a reason for that shift. It certainly could be. It could be education. It could be a number of other reasons or it could be that just a number of hate crimes weren't reported, they weren't either reported by the victims or they weren't reported by local law enforcement because maybe it just didn't rise to the level in their mind. So it's difficult to say one way or the other from the FBI's point of view whether there is a reason for that decrease here in Wisconsin."<sup>127</sup> Ms. Zeidman testified that regardless of whether under reporting stems from victims or law enforcement, "...together we need to work to address and reduce both levels of underreporting."<sup>128</sup>

Panelist Jeannine Bell described her research in this area, which indicated that law enforcement officers have a great deal of discretion in identifying and responding to hate crimes. "police officers in hate crime units have significant discretion regarding whether to enforce the law, whether to investigate and when and whether to arrest perpetrators. This is not a simple decision like it is in traffic, write a ticket or not. There are lots of different options they have, and each of the options that they select affect[s] the amount of services that victims will receive."<sup>129</sup>

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<sup>127</sup> Elgersma testimony, 2013 *Transcript*, p. 168 line 25 – p. 169 line 17

<sup>128</sup> Zeidman testimony, 2013 *Transcript*, p. 18 lines 09-16

<sup>129</sup> Bell Testimony, 2013 *Transcript*, p. 37 lines 13-21

## **V. FINDINGS AND RECOMMENDATIONS**

### **A. Findings**

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### **B. Recommendations**

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## **Wisconsin Advisory Committee to the United States Commission on Civil Rights**



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